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September 24, 1998

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ROOM

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street N.W., Rm 222
Washington, D.C. 20554

Re: In the Matter of Deployment of Wireline Services Offering
Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Ms. Salas:

Enclosed for filing in the above-referenced matter please find the original and nine copies of the Comments of the Minnesota Department of Public Service.

Also enclosed is a document marked "receipt copy" for date stamping and a self addressed, stamped envelope.

Sincerely,

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SEP 25 1998

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In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

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CC Docket No. 98-147

COMMENTS OF THE
MINNESOTA DEPARTMENT OF PUBLIC SERVICE

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INTRODUCTION AND SUMMARY OF ARGUMENT

On August 7, 1998, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) asking for comment on proposals to speed deployment of advanced telecommunications services.¹ The FCC proposed allowing an incumbent local exchange carrier (LEC) to offer advanced services through a separate affiliate free from incumbent LEC regulation. The FCC also proposed imposing additional requirements on incumbent LECs to provide collocation and access to loops, and sought comment on ways to modify the section 251(c) unbundling requirements. Finally, the FCC sought comment on measures that would provide Bell Operating Companies (BOCs) with targeted interLATA relief on the theory that such relief would aid all consumers, even those in rural areas, to reap the benefits of advanced telecommunications capability.

The Minnesota Department of Public Service (Department) is a state agency with regulatory and enforcement responsibilities with respect to telephone, gas, and electric services.² The Department has investigated problems associated with the advanced services offerings of U S WEST, the largest incumbent LEC in Minnesota. In addition, because the state of Minnesota is largely comprised of rural areas, the Department has expertise in analyzing the needs of rural telecommunications service consumers. The Department offers its comments in

1 Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147 (rel. Aug. 7, 1998) (NPRM).

2 See, e.g., Minn. Stat. § 216A.07, subd. 2.

this proceeding out of concern that the FCC's proposals, without some modification, may in fact hinder rather than encourage deployment of advanced services to consumers.

Development of competition in the advanced services marketplace is the best means of speeding deployment of advanced services to all consumers, in all areas, both rural and urban. The Department thus supports specific modifications to the FCC's proposals that will encourage the development of competition in this increasingly important market. The Department urges the FCC not to exempt any advanced services incumbent LEC affiliate from nondominant regulation, at least not for a transition period until the various incumbent LEC corporate entities demonstrate that they are not granting one another any competitive advantage. The Department's experiences with U S WEST's offerings of advanced services indicate that, absent careful oversight, U S WEST's various corporate sections will do their best to favor one another at the expense of competitors. For example, as described below, U S WEST has provided and promoted its digital subscriber line (DSL) service in Minnesota in a manner that encourages end user customers to sign up with its information services affiliate, USWEST.NET, rather than with unaffiliated information service providers (ISPs). The Department thus urges the FCC not to remove immediately the tariff requirement, through which consumers, carriers, the Department, and other regulatory and enforcement agencies can monitor whether an incumbent LEC's advanced services affiliate is truly separate and treating all customers fairly and equally. The FCC should also continue to require any BOC advanced services affiliate to offer competing ISPs nondiscriminatory access to telecommunications services utilized by the BOC information services. In addition, the Department supports some minimum pro-competitive restraints on

joint marketing among affiliates, upon which state regulators could build as necessary to encourage and protect competition. The Department further advocates that transfers of customer accounts and customer proprietary network information (CPNI) from an incumbent LEC to its advanced services affiliate, as well as joint marketing, should be deemed to make that affiliate an assign of the incumbent LEC. Moreover, the Department generally supports the FCC's proposals to strengthen collocation and access to loop requirements for incumbent LECs, and to examine additional unbundling requirements. Finally, the Department disagrees with the FCC's tentative conclusion that BOCs should be allowed to carry packet-switched traffic across LATA boundaries for the purpose of providing their subscribers with high-speed connections to nearby network access points. However, if the FCC adopts its tentative conclusion, the Department proposes criteria that BOCs should be required to meet in order for their requests to be granted.

The FCC should deem any requirements it enacts in this proceeding as a minimum beyond which state agencies can impose additional requirements as necessary to advance competition in the advanced services and information services markets in their specific states. The most effective method of advancing competition in the advanced services market is to allow states the flexibility to adopt additional requirements that address state-specific competitive circumstances. State regulators must retain the freedom to impose additional safeguards consistent with the principle of speeding deployment of advanced services through encouraging competition and to intervene if they witness an incumbent LEC or its advanced services affiliate acting anticompetitively.

ARGUMENT

I. TO SPEED DEPLOYMENT OF ADVANCED SERVICES TO ALL AREAS, RURAL AND URBAN, THE FCC'S RULES MUST ADVANCE COMPETITION IN THE ADVANCED SERVICES MARKET.

The Department is committed to encouraging the deployment of advanced services to all consumers, in all areas, both rural and urban. Development of competition in the advanced services marketplace is the best means of speeding deployment of advanced services, as well as deployment of information services. Competition gives incumbent carriers an incentive to develop new and innovative services such as advanced services, and to provide those services more quickly and efficiently and at a higher level of quality. Thus, any FCC rules relating to advanced services should enable and encourage competition in the advanced services marketplace.

The theory behind the 1996 Act is that competition, and the resulting benefits such as development of new and innovative services, will be brought about through a carefully constructed system whereby incumbent LECs are promised new freedoms as an incentive to open up the network and provide new entrants with items necessary for competitive entry. If incumbent LECs acquire part of this flexibility without having to fulfill their obligations to open up the network, then the incentives for incumbent LECs to ever open up the network are greatly reduced. Congress's carefully constructed balance will thus be destroyed.

The Department is concerned that the FCC's proposals, as currently stated, tip the balance in favor of the incumbent LECs. The Department fears that the FCC's proposals provide

incumbent LECs with a large part of what they desire without firmly enforcing the requirements of the 1996 Act or the FCC's own rules to aid competitive entry. Advanced services are not some small, unimportant subset of services that can be treated as an exception to the general rules set forth by the FCC's rules on local competition. Rather, "advanced" services may soon take on an everyday character as technology continues to develop rapidly. Advanced services could well be a major source of the telecommunications market's growth in the future. Thus, if gaining flexibility in providing advanced services is one of the incumbent LECs' primary goals, then granting flexibility now without demanding the incumbent LECs fulfill their obligations eliminates in large part their incentive to ever open the network.

II. THE MOST EFFECTIVE METHOD OF ADVANCING COMPETITION IN THE ADVANCED SERVICES MARKET IS TO ALLOW STATES THE FLEXIBILITY TO ADOPT ADDITIONAL REQUIREMENTS THAT ADDRESS STATE-SPECIFIC COMPETITIVE CIRCUMSTANCES.

The FCC should deem any requirements it enacts in this proceeding as a minimum beyond which state agencies can impose additional requirements as necessary to advance competition in the advanced services and information services markets in their specific states. The advanced services and information services markets differ greatly in different regions of the country. For example, as discussed below in section III.A., in Minnesota U S WEST is a monopoly provider of DSL service in its service territory. Many of the competitors to U S WEST's information service affiliate, USWEST.NET, are small, local ISPs. U S WEST controls these small ISPs' connection with its DSL service (called MegaBit Service) and thus whether these ISPs' customers may take advantage of high-speed Internet access. State regulators are

uniquely positioned to evaluate such regional differences, and to determine whether the minimum federally-set rules are sufficient to encourage and protect competition, or whether more action is necessary.

Thus, state regulators must retain the freedom to impose additional safeguards consistent with the principle of speeding deployment of advanced services through encouraging competition and to intervene if they witness an incumbent LEC or its advanced services affiliate committing anticompetitive actions. The FCC should not prevent state regulators from adjusting regulation of incumbent LECs' advanced services affiliates according to the needs and conditions of the particular state. State regulators should be able to regulate an incumbent LEC's advanced services affiliate differently than other competitive local exchange carriers (CLECs) that are offering advanced services.³ State regulators should be able to impose additional safeguards if conditions in that state warrant them. Furthermore because state regulators are frequently the primary enforcers of fair market behavior, they must have the freedom to intervene if they observe advanced services affiliates practicing discriminatory and anticompetitive conduct.

III. ANY AFFILIATE ARRANGEMENT MUST ENSURE THAT AN INCUMBENT LEC, ITS ADVANCED SERVICES AFFILIATE, AND ITS INFORMATION SERVICES AFFILIATE CANNOT FAVOR ONE ANOTHER OVER COMPETITORS.

The FCC proposes allowing an incumbent LEC to establish an advanced services affiliate that would not be deemed an incumbent LEC if it complies with a set of structural separation and

³ See NPRM at ¶ 116.

nondiscrimination requirements.⁴ The FCC invites commenters to propose specific modifications to the criteria it sets forth. The FCC particularly seeks comment as to how any proposed modification addresses concerns that incumbent LECs could improperly discriminate against competing providers.⁵ The FCC also asks whether incumbent LECs that have formed their own information service providers (ISPs) are likely to be favored by incumbent LEC advanced services affiliates, to the detriment of unaffiliated competing ISPs.⁶

A. Experience Demonstrates That Incumbent LEC Affiliates Will Attempt To Favor One Another, e.g., That an Advanced Services Affiliate Will Attempt To Discriminate Against Independent ISPs.

A current example of favoritism between incumbent LEC affiliates is U S WEST's discrimination in providing advanced services where it is giving its own information service affiliate preferential treatment over competing independent ISPs. As a result of U S WEST's anticompetitive actions, competing ISPs have experienced significant difficulties in offering service to customers who ordered U S WEST's digital subscriber line (DSL) service. The Department and the Minnesota Office of the Attorney General have filed a joint complaint (Complaint) with the Minnesota Public Utilities Commission (MN PUC) against U S WEST for

4 NPRM at ¶ 96.

5 NPRM at ¶ 97.

6 NPRM at ¶ 102.

discriminatory provisioning of its DSL service. The Complaint is included in these comments as Appendix A.⁷

As detailed in the Complaint, U S WEST is a monopoly provider of DSL service in its service territory. On April 3, 1998, U S WEST filed its tariff for a DSL service called "MegaBit Service" with the MN PUC with an effective date of April 13, 1998. MegaBit Service allows simultaneous use of voice grade service -- i.e., plain old telephone service (POTS) -- and high-speed data service -- i.e., DSL service -- over a single pair of copper wires. MegaBit Service allows end user customers to transmit data at speeds between 5 times and 250 times faster than conventional analog modems. MegaBit Service consists of two parts, MegaSubscriber and MegaCentral. MegaSubscriber provides a connection from the end user customer's premises to the local U S WEST central office. MegaCentral provides a connection from the central office via U S WEST's Asynchronous Transfer Mode (ATM) network to the ISP. In order for end user customers to achieve fast access to the Internet through MegaBit Service, they would (1) have to subscribe to U S WEST's MegaSubscriber service, and (2) have to subscribe to an Internet service provided by an ISP who has subscribed to MegaCentral. U S WEST controls all access points in the network used for MegaBit Service and wields significant market power and influence.⁸

7 The Washington Utilities and Transportation Commission had similar concerns and imposed conditions to ensure fair treatment of competing ISPs on U S WEST's MegaBit Service offering. That order is included in these comments as Appendix B.

8 Appendix A at ¶¶ 7-14, attachment A at ¶ 3.

The Complaint alleges that U S WEST's deployment of MegaBit discriminates in favor of its information services affiliate. U S WEST claimed that it had not accepted orders for processing from any ISPs for MegaCentral until the effective date of the tariff. However, subsequent evidence demonstrated that U S WEST had in fact accepted two orders prior to the tariff's effective date -- from two U S WEST information services affiliates, USWEST.NET Minneapolis and USWEST.NET Rochester. In contrast, when an unaffiliated ISP, Sihope Communications, attempted to order MegaCentral before the effective tariff date, U S WEST delayed processing the order until after the service was tariffed.⁹

In addition, the Complaint alleges, U S WEST provisioned its affiliate, USWEST.NET, with facilities necessary to offer Internet access through MegaBit much sooner than it did for independent ISPs. Independent ISPs have experienced delays and difficulties obtaining the necessary MegaCentral Links (i.e., DS1 and DS3 private line transport) and MegaCentral Ports from U S WEST. While U S WEST provided the necessary facilities for USWEST.NET in Minneapolis to provide MegaBit Service on or about May 8, 1998, unaffiliated ISP Sihope Communications was not able to become operational until May 29, 1998.¹⁰

The Complaint alleges that U S WEST timed its promotion for MegaBit Service so that most end user customers who did not subscribe to Internet services from USWEST.NET could

9 Appendix A at ¶¶ 23-24, attachment A at ¶ 5.

10 Appendix A at ¶¶ 22-24, attachment A at ¶ 6. U S WEST estimates that installation of MegaCentral facilities was completed for USWEST.NET on Friday, May 8, 1998, or Monday, May 11, 1998. Appendix A at attachment A at ¶ 6.

not take advantage of the promotion. On or about May 8, 1998, concurrent with installing MegaCentral at USWEST.NET, U S WEST initiated a promotion for MegaBit. End user customers who signed up received a free digital modem, USWEST.NET Internet access installation, and reduced rate set-up and training. Until the end of May, although numerous independent ISPs had ordered MegaCentral, U S WEST had only installed MegaCentral at USWEST.NET and possibly one independent ISP. End user customers could not receive the promotional benefits unless they subscribed to or switched to an ISP that had already installed MegaCentral. Thus, during May, USWEST.NET and possibly one independent ISP were the only ISP options for customers wanting to order MegaBit. As a result, the overwhelming majority of end user customers who participated in U S WEST's promotion went to USWEST.NET as their ISP.¹¹

The Complaint further alleges that U S WEST's business office practices provided USWEST.NET with a marketing advantage over competing ISPs. In direct mailings to end user customers, U S WEST provided a toll free telephone number, 1-888-MegaUSW, to order MegaBit Service. Customers calling this number were given two options to continue the ordering process. Option 1 was to order MegaBit as provided in conjunction with USWEST.NET. Option 2 enabled customers to order MegaBit as provided in conjunction with other ISPs. The vast majority of customers responding to the 888 number, having no need to listen further than Option 1 to order MegaBit, chose USWEST.NET as their ISP. In addition,

¹¹ Appendix A at ¶¶ 17-18, 23-25, attachment A at ¶ 7

U S WEST has indicated that it may eliminate Option 2 from the 1-888-MegaUSW marketing script, so that customers calling that toll free number to order MegaBit Service will only be able to order MegaBit in conjunction with USWEST.NET¹²

B. If the FCC Allows Incumbent LECs To Provide Advanced Services Through Affiliates Not Subject To Incumbent LEC Regulation, Then It Should Strengthen Its Proposed Structural and Nondiscrimination Requirements.

Development of competition in the advanced services marketplace is the best means of speeding deployment of advanced services to all consumers, in all areas, both rural and urban. Allowing one provider, likely the incumbent LEC, to dominate the market would limit consumer choice and reduce the incentives for that one provider to develop new and innovative services and to improve service quality. Thus, if the FCC is determined to allow incumbent LECs to provide advanced services through affiliates not subject to incumbent LEC regulation, the Department supports specific modifications to the FCC's proposals that will encourage the development of competition in this increasingly important market and hopefully will prevent the abuses experienced thus far in U S WEST's provision of advanced services. Also, the Department urges that state regulators must retain the freedom to impose additional safeguards consistent with the principle of speeding deployment of advanced services through encouraging

12 Appendix A at ¶¶ 27-37, attachment A at ¶ 8. U S WEST has indicated that it will provide a separate toll free number for end user customers to call to subscribe to MegaBit in conjunction with all other ISPs. However, U S WEST's marketing for MegaBit will list the original toll free number that will only connect callers with USWEST.NET. It is unclear how or if U S WEST would market the separate toll free number with the other ISPs. Id.

competition and to intervene if they witness an incumbent LEC or its advanced services affiliate behaving anticompetitively

First, the Department urges the FCC not to exempt any advanced services incumbent LEC affiliate from nondominant regulation, at least not for a transition period until the various incumbent LEC parts demonstrate that they are not granting one another any competitive advantage. As chronicled above in section III A the Department's experiences with U S WEST's offering of advanced services indicate that, absent careful oversight, U S WEST's various corporate sections will do their best to favor one another at the expense of competitors. Second, the FCC should continue to require any BOC advanced services affiliate to offer competing ISPs nondiscriminatory access to telecommunications services utilized by the BOC information services. Third, the Department supports some minimum pro-competitive restraints on joint marketing among affiliates, which state regulators could build upon as necessary to encourage and protect competition.

The Department urges the FCC not to excuse the advanced services affiliate from nondominant regulation. The Department agrees with the view expressed by CompTel earlier in this proceeding that the grant of nondominant status to BOCs providing advanced services is inappropriate because new entrants are dependent upon BOC provisioning of local loops and other essential facilities, providing a powerful vehicle for BOCs to exercise market power in data services.¹³ The Department is concerned that allowing an advanced services affiliate to be

¹³ See NPRM at ¶ 100 n.198 (citing Comments of the Competitive Telecommunications Association (CompTel), CC Docket Nos. 98-11 98-26, and 98-32).

regulated as nondominant, and to be excused from the tariff requirement, cripples the ability to monitor whether an incumbent LEC's advanced services affiliate is truly separate. Tariffing allows consumers and carriers to ensure that they are receiving fair treatment and being offered similar terms and conditions as the incumbent LEC affiliate. Tariffing also permits the Department and other regulatory enforcement agencies to monitor potential abuses by the incumbent LEC affiliate, abuses which experience has shown are likely to happen. For example, as discussed above in section III.A., U S WEST's tariff for its DSL service, which contained specific dates when the service was to have been available equally to all ISPs, helped the Department track how U S WEST in fact favored its own information services affiliate in provisioning its DSL service.

If the FCC is determined to presume such affiliates nondominant, the Department advocates, at the very least, that the FCC continue to regulate the affiliates as dominant for a transition period until the affiliate has demonstrated that it will not abuse its new flexibility. Regulation as dominant could sunset after, for example, three years, unless the FCC deems it appropriate to extend dominant regulation.¹⁴ The FCC is already considering the idea that its proposed affiliate safeguards would sunset after a certain period of time or change in conditions.¹⁵ The Department urges the FCC to modify that concept by taking one step back and

14 Cf. 47 U.S.C. § 272(f)(1) (providing that the provisions of section 272 shall cease to apply with respect to the a BOC's interLATA telecommunications services three years after the date the BOC is authorized to provide interLATA services under section 271(d), but authorizing the FCC to extend such three-year period by rule or order); NPRM at ¶ 99.

15 NPRM at ¶ 99.

maintaining the safeguard of dominant regulation at least for a transition period during which the FCC can determine whether such protection is truly unnecessary.

Second, the Department urges the FCC to continue to require any BOC advanced services affiliate to offer competing ISPs nondiscriminatory access to telecommunications services utilized by the BOC information services. As discussed in detail above in section III.A., U S WEST is already attempting to shirk this obligation when offering DSL services on an integrated basis. U S WEST has given its information services affiliate priority in the installation of and access to its MegaBit Service, resulting in delayed service and loss of business for competing ISPs. The Department fears that U S WEST's current anticompetitive actions may intensify if U S WEST is allowed to offer advanced services through an affiliate subject to less regulation.

Third, the Department proposes that the FCC specify some limitations on joint marketing between the incumbent LEC advanced services affiliate, the incumbent LEC, and the incumbent LEC's information services affiliate. Without reasonable constraints to ensure competitive neutrality, an incumbent LEC or its advanced services affiliate can greatly advantage that incumbent LEC's information services affiliate, to the detriment of competing ISPs, through discriminatory joint marketing. For example, as discussed above in section III.A., U S WEST promoted a toll free telephone number, 1-888-MegaUSW, to order MegaBit Service. Customers calling this number were given two options to continue the ordering process. Option 1 was to order MegaBit as provided in conjunction with USWEST.NET. Option 2 enabled customers to order MegaBit as provided in conjunction with other ISPs. The vast majority of customers

responding to the 888 number, having no need to listen further than Option 1 to order MegaBit, chose USWEST.NET as their ISP.¹⁶

The FCC should, at the very least, prevent incumbent LECs from leveraging their local monopoly status to advantage their affiliates through joint marketing by enacting equal access standards similar to those required for BOC in-region, interLATA services affiliates. 47 U.S.C. § 251(g) requires each LEC, to the extent that it provides wireline services, to provide exchange access, information access, and exchange services for such access to interexchange carriers and ISPs in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations that applied before the passage of the 1996 Act. In the context of joint marketing by a BOC's in-region, interLATA services affiliate governed under 47 U.S.C. § 272(g)(1),¹⁷ the FCC has held that, although a BOC may market its affiliate's services, the BOC must still advise new customers of their other options for interLATA services.¹⁸ The FCC could similarly require that, although an incumbent LEC's advanced services affiliate may market the information services of another of the incumbent LEC's affiliates, the advanced services affiliate must still advise new customers of its other options for information services.

16 See supra section III.A.; Appendix A at ¶¶ 27-29, attachment A at ¶ 8.

17 That statutory provision prohibits a BOC affiliate from marketing or selling telephone exchange services provided by the BOC unless the BOC permits other entities offering the same or similar service to market and sell its telephone exchange services.

18 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22046-47 (1996).

This standard would at least prevent U S WEST's latest discriminatory planned marketing strategy to eliminate Option 2 from the inbound marketing script to order U S WEST's DSL service, so that as a result, customers calling will be able to order MegaBit only in conjunction with its information services affiliate, USWEST.NET.¹⁹ Under this strategy, U S WEST would market its advanced services in conjunction with USWEST.NET, without advising inbound callers of their other options for ISPs.

Whether or not the FCC adopts restrictions on joint marketing to protect competition, states should have the flexibility to address specific anticompetitive joint marketing behavior in their regions. States are in the best position to evaluate how a particular incumbent LEC joint marketing strategy will affect competitive entry in their specific regions.

C. Transfers Of Customer Accounts And CPNI From An Incumbent LEC To Its Advanced Services Affiliate, As Well As Joint Marketing, Should Make The Advanced Services Affiliate An Assign Of The Incumbent LEC.

In general, the FCC should be highly suspicious of any transfers from an incumbent LEC to its advanced services affiliate, given the great incentive for an affiliate to favor the incumbent LEC's interests. In particular, transfers of customer accounts and CPNI, as well as joint marketing, should make an incumbent LEC's advanced services affiliate an assign.²⁰ Customer

19 See infra section III.A.; Appendix A at ¶¶ 36-37, attachment A at ¶ 8. U S WEST has indicated that it will provide a separate toll free number for end user customers to call to subscribe to MegaBit in conjunction with all other ISPs. However, U S WEST's marketing for MegaBit will list the original toll free number that will only connect callers with USWEST.NET. It is unclear how or if U S WEST would market the separate toll free number with the other ISPs. Id.

20 See NPRM at ¶ 113.

accounts and local service CPNI are assets that the incumbent LEC acquired as an incumbent monopoly. No CLEC was able to acquire these assets during the incumbent LEC's monopoly regime. Similarly, when joint marketing, the incumbent LEC uses assets acquired from its incumbent monopoly status on behalf of its advanced services affiliate. Transfers of assets acquired solely due to incumbent monopoly status should equate to a transfer of incumbent LEC status as well. To hold otherwise would be contrary to one of the central principles of the 1996 Act -- to ensure, to the maximum extent possible, that, as markets are opened to competition, carriers will win or retain customers on the basis of their service quality and prices, not on the basis of a competitive advantage conferred solely due to their incumbent monopoly status.

IV. THE FCC SHOULD ESTABLISH ADDITIONAL MINIMUM COLLOCATION AND LOOP REQUIREMENTS THAT STATES CAN SUPPLEMENT.

The FCC should establish additional requirements for collocation and access to local loops that will remove barriers to entry and speed deployment of advanced services. As discussed above, the 1996 Act envisioned that competition, and the resulting benefits such as development of new and innovative services, would be brought about through a carefully constructed balance whereby incumbent LECs receive new freedoms in return for opening up the network and providing new entrants with items necessary for competitive entry. Thus, any additional new flexibility that incumbent LECs acquire, such as the FCC's instant proposal to allow separate incumbent LEC advanced services affiliates, must be offset by additional new incumbent LEC obligations to open up the network in order to maintain the delicate Congressionally mandated balance.

The Department agrees with the FCC's tentative conclusion that any standards the FCC adopts should serve as minimum requirements, and that states should continue to have flexibility to adopt additional requirements that respond to issues specific to that state or region.²¹ State regulatory and enforcement agencies are in the best position to gather information concerning the unique competitive environment in their particular states and to evaluate what supplementary actions may be necessary to advance competition. Thus, state agencies need the freedom to address state and region-specific concerns that may arise, as well as the authority to take necessary action to prevent anticompetitive behavior.

The FCC also specifically asks for comment on cageless collocation arrangements, such as that offered by U S WEST.²² The Department has examined U S WEST's cageless collocation proposal. As an initial matter, the Department strongly prefers that U S WEST maintain the existing combinations of its network instead of using cageless collocation to provide combinations of unbundled network elements (UNEs) to CLECs. If cageless collocation is to be used, the Department has concerns regarding security, efficient use of space, and service quality. U S WEST's proposal requires all CLECs to use one "SPOT frame" to gain access to UNEs. CLECs can either combine UNEs at the SPOT frame or connect to their individual collocation spaces and combine the UNEs there. Giving all CLECs access to one another's equipment at the SPOT frame may result in security problems. Due to security or other concerns, CLECs may

21 NPRM at ¶¶ 124, 155.

22 NPRM at ¶¶ 137-41.

well want to maintain their individual collocation spaces. Thus, the insertion of the SPOT frame into the collocation process may actually result in less available space for collocation. Moreover, the additional time required to construct and install the SPOT frame may increase the overall collocation construction and installation time for CLECs, thus impairing CLEC customers' quality of service. If the FCC requires that incumbent LECs provide alternative collocation arrangements, such as cageless collocation, the Department urges the FCC to incorporate measures to alleviate these concerns.

V. THE FCC SHOULD REQUIRE A MINIMUM LEVEL OF UNBUNDLING OF NETWORK ELEMENTS, WHILE LEAVING STATES THE AUTHORITY TO ORDER FURTHER UNBUNDLING BASED ON THE NEEDS OF NEW ENTRANTS IN THE PARTICULAR STATE.

The Department supports unbundling of network elements used by incumbent LECs in the provision of advanced services to the extent such network elements are actually requested by new entrants. Thus, the FCC should require a minimum level of unbundling of network elements that the majority of new entrants nationwide need to enter the market effectively. Incumbent LECs should be subject to the same standards of unbundling as the FCC required in its Local Competition Order, to the extent the network elements are the same, plus any additional requirements that the FCC deems necessary to encourage competitive entry and speed the deployment of advanced services.²³ The FCC should also continue to allow state regulators to order further unbundling, consistent with the FCC's standards, based on the needs of new entrants in the particular state.²⁴ This approach will minimize unnecessary unbundling where no

²³ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15990-15640-44 (Local Competition Order).

²⁴ See id.; 47 C.F.R. § 51.317.

new entrant actually desires a network element, while ensuring that new entrants will obtain necessary network elements.

VI. THE FCC SHOULD NOT ALLOW BOCs TO CARRY PACKET-SWITCHED TRAFFIC ACROSS CURRENT LATA BOUNDARIES. IF THE FCC DOES ALLOW THIS, IT SHOULD REQUIRE THE REQUESTING BOC TO DEMONSTRATE ITS COMMITMENT TO SPECIFIC ROLLOUTS OF SERVICE IN RURAL AREAS.

The FCC in its NPRM seeks comment on the criteria that it should use to evaluate LATA boundary modification requests that would allow BOCs to carry packet-switched traffic across current LATA boundaries for the purpose of providing high-speed connections to nearby network access points. The FCC tentatively concludes that some modification of LATA boundaries may be necessary to provide subscribers in rural areas with the same type of access to the Internet as other subscribers throughout the nation.²⁵

The Department disagrees with the FCC's tentative conclusion. The Department opposes granting a BOC the authority to cross LATA boundaries before it meets the requirements set forth in section 271 of the Communications Act of 1934 for BOC entry into in-region, interLATA services. The BOCs have not demonstrated that such modification of LATA boundaries will improve rural access to the Internet or rural high-speed access to the Internet. For example, the illustrations in U S WEST's earlier Petition for Relief in this proceeding demonstrate that U S WEST and other providers have placed their backbone networks for

²⁵ NPRM at ¶¶ 193-94.

advanced services in population centers rather than rural areas.²⁶ Thus, there is no historical evidence that the BOCs would find it profitable to place advanced services facilities in rural areas or have any plans to do so. In fact, the FCC should consider the possibility that the BOCs' major interest is rather to offer their in-region customers access to a national backbone network in order to improve their ability to compete with other companies in providing advanced services in major population centers.

If the FCC adopts its tentative conclusion, the Department urges the FCC to deny such requests unless the BOC demonstrates its commitment to specific rollouts of service in the rural areas that are the basis of its requests for modifications of LATA boundaries. If a BOC requests a modification of LATA boundaries on the basis that such modification will allow the BOC to better serve rural areas, then the FCC should require a BOC to identify the specific rural areas that will benefit from such modification. The FCC should then require the BOC to commit to install advanced services facilities in those specific rural areas. Such a commitment should include, but not be limited to, a binding timetable for construction and operation of those advanced services facilities. The FCC should further require the BOC to explain how its plans would provide advanced services to that rural area at lower cost than is currently available, and commit to following through on the projected lower cost. If the BOC fails to meet its commitments, then its authority to cross LATA boundaries should be revoked.

26 See Petition of U S WEST Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26 (filed Feb. 25, 1998); Comments of Minnesota Department of Public Service in the Matter of Petition of U S WEST Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26, at 8-10 (filed Apr. 6, 1998).